Petitioner's Brief

Supreme Court of the United States

October Term, 1957

No. 69

SAFEWAY STORES, INCORPORATED,
a corporation
Petitioner,

vs.

HARRY V. VANCE, Trustee in
Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the United States District Court, for the District of New Mexico, is reported in 137 F. Supp. 841. It likewise appears in the Record herein, beginning at page 8. The opinion of the Court of Appeals for the Tenth Circuit is reported in 239 F.2d 144 and also appears in the Record herein, beginning at page 30. No opinion was rendered by the Court of Appeals in denying Petition for Rehearing.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit, sought to be reviewed, was dated November 6, 1956, and entered on the same date (R. 34).

The Petition for Rehearing was filed on November 26, 1956, (R. 34) and denied by Order entered December 4 (R. 42). On December 12, 1956, an Order was issued staying issuance of the mandate for thirty days from December 14, 1956, pending Petition for Certiorari (R. 42). Petition for Certiorari was filed January 22, 1957, and Certiorari was granted by Order filed in this cause March 4, 1957 (R. 42).

Jurisdiction of this Court is invoked under 28 USC, Sec. 1254 (1).

QUESTION PRESENTED

Does section 3 of the Robinson-Patman Act amend the Clayton Act so as to be one of the "antitrust laws" defined in section 1 of the Clayton Act, for violation of which section 4 of the Clayton Act creates a civil treble damage remedy?

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved, and the pertinent parts thereof are quoted herein as follows:

Robinson-Patman Act, Section 3,
49 Stat. 1528, Title 15 USC 13a:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competi

tors of the purchaser, in that any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

Clayton Act, Section 4,
38 Stat. 731, Title 15 USC 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act, Section 1,
38 Stat. 730 (1st paragraph)

"That 'antitrust laws' as used herein includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', of August twenty-seventh, eighteen hundred and ninety-four; an Act,

entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved February twelfth, nineteen hundred and thirteen; and also this act.''

Title 15 USC 12 (1st paragraph)

''As used in sections 12, 13, 14-21, and 22-27 of this title, 'antitrust laws' includes sections 1-27 of this title.''

STATEMENT OF THE CASE

The judgment of the Court of Appeals sought to be reviewed reversed the judgment of the District Court dismissing the First Amended Complaint (R. 34).

The First Amended Complaint charges petitioner with violations of Section 3 of the Robinson-Patman Act, 15 USC 13a, by selling goods in one part of the United States at prices lower than those exacted elsewhere in the United States, and by selling goods at unreasonably low prices, all for the purpose of destroying competition or eliminating competitors (R. 1-5).

Petitioner filed its Motion to Dismiss on the ground among others, that section 3 of the Robinson-Patman Act, 15 USC 13a, is not one of the "antitrust laws" within the purview of Section 4 of the Clayton Act, 15 USC 15, and consequently no private right of action for treble damages for violation thereof exists under the laws of the United States (R. 6). The District Court sustained the Motion to Dismiss on the ground above stated, reserving its ruling on other grounds included in the Motion, and entered its Order dismissing the case on January 18, 1956 (R. 7). Said order

granted respondent thirty days in which to amend, and respondent thereafter filed its election not to amend (R. 27). The District Court thereupon entered a supplemental order dismissing the First Amended Complaint, and the case (R. 27). An appeal was taken from this judgment (R. 28).

The Court of Appeals reversed the judgment of the District Court, and remanded the case for further proceedings (R. 34). The Court of Appeals held that section 3 of the Robinson-Patman Act 15 USC 13a, was an amendment of the Clayton Act and therefore an "antitrust law" within the meaning of section 4 of the Clayton Act, 15 USC 15, for violation of which a private litigant had a civil remedy for treble damages for any injury to his property caused by such violation, pursuant to 15 USC 15.

Federal jurisdiction in the court of first instance was based on Title 28 USC 1337.

SUMMARY OF ARGUMENT

A.

The complaint forming the basis of this action charges only that petitioner violated certain portions of section 3 of the Robinson-Patman Act (49 Stat. 1528; 15 U.S.C. 13a). That section is a criminal statute which does not provide a private treble damage remedy.

Where Congress creates an offense and provides a penalty, that penalty is exclusive. *Wilder Mfg. Co. v. Corn Products Co.*, 236 U.S. 165, 174-5 (1914). Section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C. 15) which authorizes private treble damage suits for violations of the "antitrust laws" does not authorize an action for violation of section

3 of the Robinson-Patman Act because that section is not an "antitrust law" as such term is defined in section 1 of the Clayton Act (38 Stat. 730; 15 U.S.C. § 12).

Section 1 of the Clayton Act defines the term "antitrust laws" to include only three named statutes, the Sherman Act (15 U.S.C. § 1, *et seq.*), the Wilson Tariff Act (as amended), and the Clayton Act. Section 3 of the Robinson-Patman Act clearly is not a part of the Sherman Act or Wilson Tariff Act. Only if it amends the Clayton Act would section 3 be an "antitrust law" for the violation of which a private action is maintainable. Despite a codification error section 3 is clearly not a part of the Clayton Act.

B.

The text, punctuation and structure of the Robinson-Patman Act show that section 3 was not intended as an amendment to the Clayton Act. When Congress enacted the Robinson-Patman Act, it enclosed only the first section of that act in quotation marks as amendatory of section 2 of the Clayton Act (15 U.S.C. § 13). Sections 2, 3, and 4 of the Robinson-Patman Act are outside of quotation marks and these sections effect the "other purposes" of the Robinson-Patman Act as expressed in the title of said Act, apart from amending the Clayton Act. It is familiar drafting practice for Congress to include in quotation marks the portions of acts which amend existing law while omitting quotation marks from those portions not amendatory. The Congressional purpose was clearly not to make section 3 of the Robinson-Patman Act an amendment to the Clayton Act. Consequently, section 3 is not an "antitrust law" as defined in section 1 of the Clayton Act.

C.

The legislative history of the Robinson-Patman Act also demonstrates that section 3 is not an amendment to or part of the Clayton Act. The report of the Conference Committee and statements of members of that Committee emphasized that only the first section of the Robinson-Patman Act amended the Clayton Act and that section 3 did not purport to amend the Clayton Act. Rather it was recognized as a separate criminal statute containing its own standards of conduct and providing its own exclusive penalty.

The question of treble damages for violations of the Robinson-Patman Act was raised in both houses during consideration of the Conference bill, but only in the sense that if the same act violated both section 3 of the bill and section 1 of the bill (the latter of which amended section 2 of the Clayton Act) the violator would be subject both to treble damages for the Clayton Act violation and also to criminal prosecution for the violation of section 3. Nowhere was it expressly stated that a violation of section 3 gave rise to a private treble damage remedy.

D.

The sounder reasoning and the more persuasive authority support the decision of the district court herein (R. 8-27) and the decision of the Court of Appeals for the Seventh Circuit in *Nashville Milk Co.* v. *Carnation Co.* 238 F.2d 86 (7th Cir. 1956), (R. 35-41). The decision of the court below (R. 30-34) relies upon authorities that cannot withstand analysis and overlooks the plain language, text and punctuation of the Robinson-Patman Act and its legislative history.

The Congressional purpose as clearly expressed in sections 1 and 4 of the Clayton Act and section 3 of the Robinson-Patman Act is that no private cause of action is created by the latter statute. Section 3's proscriptions are extremely vague and to a certain extent overlap the provisions of other statutes. In the absence of clear Congressional authorization for private suits under that statute the public policy is best served by limiting the enforcement of the statute to governmental authorities. A court is not at liberty to do what Congress clearly did not do.

Accordingly, on principle and on authority the enforcement of section 3 must be entrusted solely and exclusively to the government.

ARGUMENT

A Private Litigant Cannot Recover Treble Damages for Violation of Section 3 of the Robinson-Patman Act

A. Section 3 is a Criminal Statute, with No Provision for a Private Treble Damage Remedy

The complaint forming the basis of this action solely alleges violations of section 3 of the Robinson-Patman Act (49 Stat. 1528; 15 U.S.C.A. 13a). That section is a criminal statute providing a penalty of a $5,000 maximum fine or imprisonment for one year or both. No civil sanctions are contained in it.

A private litigant has no right of action under the anti-trust laws unless that right is specifically granted by Congress. This Court has frequently applied the rule that

where Congress creates an offense and provides a penalty that penalty is exclusive.

This principle is illustrated by the case of *Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165 (1914). There the defendant sought to defend an action for the price of goods sold by pleading the illegality of the plaintiff corporation, alleging that it was organized in violation of the Sherman Act (15 U.S.C. 1, *et seq.*). This Court held that no such remedy was provided by that Act, stating (pp. 174-5):

> "It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.'"

When the Government sought to maintain an action for treble damages for violation of the Sherman Act, this Court held that the Government was not a "person" within section 7 of that Act and could not maintain the action. *United States v. Cliquot Corp.*, 312 U.S. 60 (1941). The remedy of injunction provided for by section 4 of the Sherman Act (38 Stat. 731; 15 U.S.C. 4) is limited to suits brought by the Government and a state or private litigant is not entitled to maintain an action under that section. *State of Minnesota v. Northern Securities Co.*, 194 U.S. 48, 70-71 (1904); *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917).

As recently as the case of *Bruce's Juices, Inc. v. Amer-*

can Can Co., 330 U.S. 743 (1946), this Court reaffirmed this doctrine and quoted with approval from the *Wilder Mfg. Co.* case, 236 U.S. 165, 174-5, the statement that where a statute creates a new offense and denounces the penalty, the penalty can only be that which the statute prescribes. In the *Bruce's Juices* case this Court refused to add a sanction not provided by Congress, refusing to declare the purchase price of goods uncollectible because sold at illegally discriminatory prices.

The right to recover treble damages, attorneys' fees and costs is a highly penal remedy, not a creature of implication. Standing alone section 3 creates no such action. It is a simple criminal statute establishing its own standards of conduct and its own penalties without reference to any other statute. Its antecedent is contained in the Canadian Criminal Code.[1]

The statute upon which respondent relies in asserting that private relief is available under section 3 of the Robinson-Patman Act is section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C. §15). Section 4 provides that any person injured in his business or property by reason of anything

[1]Section 3 is based on Section 498A of the Canadian Criminal Code which provides:

"(1) Every person engaged in trade or commerce or industry is guilty of an indictable offense and liable to penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who (a) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

"The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

"(b) engaged in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

"(c) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor" (25-26 Geo. V., Ch. 56, Sec. 9).

forbidden in the "antitrust laws" may recover treble damages.

The term "antitrust laws" for violations of which section 4 of the Clayton Act affords private relief is not just a general phrase. The Clayton Act contains its own dictionary in its first section (38 Stat. 730; 15 U.S.C. 12), defining the term "antitrust laws" and stating precisely what this term means as used throughout the Act.

Section 1 of the Clayton Act provides in part as follows:

> "That 'antitrust laws' as used herein includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved February twelfth, nineteen hundred and thirteen; and also this Act."

In short, Section 1 of the Clayton Act defines "antitrust laws", as such term is used through the Clayton Act, to mean:

1. The Sherman Act (Act of July 2, 1890),

2. Portions of the Wilson Tariff Act (Act of August 27, 1894),

3. The Act amending the Wilson Tariff Act (Act of February 12, 1913), and

4. The Clayton Act ("this Act").

The specific mention of these acts as "antitrust laws" necessarily excludes all other acts such as the Federal Trade Commission Act (15 U.S.C. §45) and all portions of the Robinson-Patman Act not amendatory of the Clayton Act. If Congress meant to include other acts as "antitrust laws" it would have been simple enough either to have specifically mentioned them or else to have refrained from the specific enumeration of any act. The expression of one thing in a statute is the implied exclusion of all other things—*inclusio unius est exclusio alterius*.[1]

Mr. Justice Brandeis stated the same idea in the following language in *Iselin* v. *United States*, 270 U.S. 245, 250, 251 (1926):

> "The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax were specified, preclude an extension of any provision by implication to any other subject. * * * What the Government asks is not a 'construction of a statute,' but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope."

So asks respondent here. But the exact and detailed definition of certain specific acts and only certain sections

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[1] Webster's New International Dictionary, 2nd Ed. 1934, defines the word "include" as follows:

"1. To confine; shut up; enclose; as, the nutshell *includes* the kernel."

"2. To comprehend or comprise, as a genus the species, the whole a part, an argument or reason the inference; to take or reckon in; to contain; embrace; as, this volume *includes* the essays; ten and *including* the tenth."

[2] Where, as here, the use of this maxim is consistent with the context of the statute and its legislative history, it is recognized as valuable aid to construction. *United States* v. *Sweeney*, 157 U.S. 281, 286 (1895); *United States* v. *Kauscher*, 119 U.S. 407, 420 (1886). Cf. *Ford* v. *United States*, 273 U.S. 593, 611-612 (1927).

of other Acts in Section 1 of the Clayton Act, as the "anti-trust laws" referred to in that Act, preclude extension thereof to any other Act or part of an Act.

Also, as Mr. Justice Frankfurter has said, one must not only listen attentively to what a statute says, but must also listen attentively to what it does not say.[1] The definition in section 1 does not say (as it easily could have said) that "antitrust laws" as used therein also included "such other acts or parts of acts, now in force or enacted hereafter, as may regulate, control or forbid any conduct in restraint of trade or tending to promote monopoly."

As the District Court noted in its decision in the case at bar (R. 14-15):

> "In order to determine the meaning of the words 'Anti-trust laws', one must look at this section of Title 15 U.S. Code, defining the words used therein. * * *"

The same conclusion was reached by the Court of Appeals for the Seventh Circuit in *Nashville Milk Co. v. Carnation Co.*, 238 F.2d 86, 88 (1956), (R. 37):

> "The Clayton Act (38 Stats. 730) defines the term 'antitrust laws' and states precisely what the term means as it is used throughout the Act. * * *"

In fact, all courts that have considered this problem, including the court below (R. 31), have followed the definition of "antitrust laws" as contained in section 1 of the Clayton Act in determining the meaning of such phrase as used in section 4 thereof. See also *Atlanta Brick Co. v. O'Neal*, 44 F.Supp. 39, 42 (E.D. Tex. 1942); *Bahian Ice*

[1] Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev. 527, 536 (1947).

Cream Co. v. Arden Farms Co., 94 F.Supp. 796, 797 (S.D. Cal. 1950).

Therefore, unless section 3 of the Robinson-Patman Act is an "antitrust law" as such term is defined in section 1 of the Clayton Act, respondent has no cause of action herein under section 4 of the Clayton Act.

The Clayton Act was passed October 15, 1914, 38 Stat. 730. The Robinson-Patman Act was not in existence at that time, it having been enacted more than twenty years later. Section 1 of the Clayton Act was never amended to include the Robinson-Patman Act, so that unless section 3 of such Act is a part of the Clayton Act it does not afford a right of action for treble damages to private litigants.

Some confusion has arisen as to whether section 3 of the Robinson-Patman Act is an "antitrust law" within section 1 of the Clayton Act because of a codification error.

In the 1926 U.S. Code, section 1 of the Clayton Act was codified in part as follows (15 U.S.C. §1):

> "'Antitrust laws', as used in sections 12-27 [the Clayton Act] of this title [title 15], includes sections 1-27 of this title."

This codification was correct at the time it was done because Sections 1-27 of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. This is also true of the 1934 Code.

The error occurred in the 1940 U.S. Code. The Robinson-Patman Act was enacted in 1936 (49 Stat. 1526). In the 1940 Code the codifiers changed the codification of Section 1 of the Clayton Act (15 U.S.C. §12) so that the statute read:

> "'Antitrust laws,' as used in sections 12, 13, 14-21

and 22-27 of this title, includes sections 1-27 of this title."

Sections 2, 3 and 4 of the Robinson-Patman Act had been codified as 15 U.S.C., §21a, 13a and 13b, respectively. The codifiers partially recognized that these sections were not part of the Clayton Act by changing the figures "12-27" in the earlier codification of 15 U.S.C. §12 to read "12, 13, 14-21 and 22-27".

But the codifiers failed to make a corresponding change in the figures "1-27" appearing in the earlier codifications. The result is that the term "antitrust laws" as used in section 1 of the Clayton Act (15 U.S.C. §12) appears to include Sections 2, 3 and 4 of the Robinson-Patman Act whereas these sections did not amend the Clayton Act, the Sherman Act or the Wilson Tariff Act. The other three acts are "antitrust laws" as such term is used throughout the Clayton Act, including Section 4 thereof (15 U.S.C. §15). The 1946 and 1952 codifications continued this error.

In providing for the codifications of its laws, Congress did not give the codifiers power to change or amend existing law or to enact new law. Section 2(a) of the Act of 1925 (1 U.S.C., p. 4) which authorized the Code states:

> "The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments."

Thus the Code is only prima facie evidence of the law. When its language differs from the language of the statute as enacted the statute itself must control. *Stephan* v. *United States*, 319 U.S. 423 (1943); *Murrell* v. *Western Union Telegraph Co.*, 160 F.2d 787, 788-9 (5th Cir. 1947).

The inconsistency between section 1 of the Clayton Act as enacted and 15 U.S.C. §12, must, therefore, be resolved by giving full force and effect to section 1 and 15 U.S.C. §12 must be disregarded.

Section 3 of the Robinson-Patman Act is clearly not part of the Sherman Act or the Wilson Tariff Act, but because section 1 of the Robinson-Patman Act (15 U.S.C. §13) clearly and explicitly amends the Clayton Act it has been contended that section 3 of the Robinson-Patman Act also amends the Clayton Act. However, the text, punctuation, structure and legislative history of that act all point to the inevitable conclusion that it does not amend the Clayton Act.

B. The Text, Punctuation and Structure of the Robinson-Patman Act Show that Section 3 was not Intended as an amendment of the Clayton Act.

The construction of a statute begins with its text. As this Court said in *United States* v. *American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."

Duparquet Co. v. *Evans*, 297 U.S. 216 (1936), also demonstrates the importance of considering the text and structure of a statute in construing the same (p. 2 *supra*):

> "There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."

The Robinson-Patman Act has four sections, the first of which is not numbered. That first section amends the Clayton Act. It does so by the familiar method of including within quotation marks the new phrasing of the amended part of the statute, as follows:

> "Be it enacted * * * That Section 2 of [the Clayton Act] is amended to read as follows:
>
> "'SEC. 2. (a) * * * * *'"

The quotation marks cover from "Sec. 2(a)" through the text of Sec. 2(f). The quotation is closed just before the beginning of section 2 of the Robinson-Patman Act. Clearly the portions of the Robinson-Patman Act which fall outside the quotation marks do not amend the Clayton Act.

Section 2 of the Robinson-Patman Act explains the manner in which the amending provisions shall be applied to pending claims and litigation and is temporary legislation, not in itself amendatory of the permanent provisions of the Clayton Act. Section 4 of the Robinson-Patman Act is an exculpatory statute for cooperative associations.

Section 3 of the Robinson-Patman Act is likewise outside of the quotation marks. Moreover, it has the same section number as the original and still existing section 3 of the Clayton Act (38 Stat. 731; 15 U.S.C. 14), which prohibits exclusive dealing contracts under certain circum-

stances. Section 3 of the Robinson-Patman Act does not supplant nor amend section 3 of the Clayton Act and in fact it does not relate to the same subject matter. By contrast the first section of the Robinson-Patman Act uses the same section number (2) as the former Clayton Act provisions which it amends and supersedes and the new section 2 deals with the same subject matter as its predecessor.

Consideration of the title and the enacting clause of the Robinson-Patman Act also compels the conclusion that only the first portion of the Robinson-Patman Act amends the Clayton Act. The title of the Robinson-Patman Act reads:

> "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), *and for other purposes.*" (Emphasis added.)

This language clearly states that the intended amendment is limited to Section 2 of the Clayton Act. Two purposes are stated: (1) To amend the Clayton Act and (2) other purposes. Only the first section amended the Clayton Act. Sections 2, 3 and 4 effect the "other purposes." If sections 2, 3, and 4 were also amendments there would be no reason to mention "other purposes" and the reference to them would be meaningless.

The enacting clause reads:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved

October 15, 1914, as amended (U.S.C., title 15, sec. 13), is amended to read as follows:"

This language expressly limits the amendment of the Clayton Act to section 2 thereof.

The holding of the court below that the enacting clause is applicable to all sections of the Act because they are not expressly excluded from such clause (R. 32) is unwarranted. This involves circular reasoning and does violence to the plain language of the Act.[1] As the district court noted in the case at bar (R. 15-16):

> "Section 2, regarding pending litigation, Section 3 being the Act upon which plaintiff Vance seeks damages herein, and Section 4 being an exclusion of cooperative associations; do not purport to be amendatory of any then existing Anti-trust Act. Congress does not appear to even have attempted to so amend existing Anti-trust Acts, and such an intent should not be implied by those of us whose duty it is to construe Congressional Statutes."

As pointed out in the opinion of the Court of Appeals for the Seventh Circuit in *Nashville Milk Company v. Carnation Company*, 238 F.2d 86, 89 (1956) (R. 39), it is familiar drafting practice for Congress to enclose in quotation marks

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[1] The ruling of the court below on this question was criticized in Frank, "Trade Regulation—Section 3 of the Robinson-Patman Act Unavailable as Basis for Private Treble-Damage and Injunction Suits," 25 Geo. Wash. L. Rev. 461 (1957) as follows (p. 464):

"It is believed that broad generalizations of this nature (i.e., 'that Sec. 3 amends the Clayton Act because it adds something to existing law to better accomplish its purpose') dismiss too readily such important counter-factors as (1) the criminal nature of section 3 as opposed to the basically civil nature of the remedies afforded by the Clayton Act; (2) the absence of quotation marks around Section 3 as contrasted with the inclusion of section 1 in quotation marks and (3) the apparent belief on the part of the authors of the Robinson-Patman Act that section 3 was a strictly criminal enactment. It is submitted that the Seventh Circuit reached the correct conclusion in the instant case; and that section 3 of the Robinson-Patman Act should not be made available to private litigants."

the portions of acts which amend existing law while omitting quotation marks from those portions not amendatory."

The omission of quotation marks around section 3 of the Robinson-Patman Act is thus highly significant. Had Congress meant section 3 as an amendment of the Clayton Act it could easily have said so.

The plain language, punctuation and structure of the Robinson-Patman Act make it clear that section 3 of that Act is not part of the Clayton Act. It necessarily follows that section 3 is not part of "this Act" as that phrase is used in section 4 of the Clayton Act (15 U.S.C. §12). From this it must be concluded that section 3 of the Robinson-Patman Act is not one of the "antitrust laws" for violation of which private treble damage relief is provided by section 4 of the Clayton Act (15 U.S.C. §15).

C. The Legislative History Demonstrates that Section 3 is Not an Amendment to or Part of the Clayton Act and that Congress' New Section 3 Does Not Authorize Private Relief.

Both of the lower courts herein (R. 14, 23-27, 31-32) as

[1] In addition to the acts cited by the Seventh Circuit in the *Corn Products* case (R. 30), see also, for example, the following acts enacted by the 84th Congress, 2nd Session:

"Vessels Carrying Passengers—Inspection and Certification", 70 Stat. at Large, Chapt. 258, Public Law 581 [H.R. 7952]

"Highway Act of 1956", 70 Stat. at Large, Chapt. 462, Public Law 627 [H.R. 10660]

"Farm Credit Act of 1956", 70 Stat. at Large, Chapt. 781, Public Law 809 [H.R. 10285]

"Marine Corps, Bandmasters' Rank", 70 Stat. at Large, Chapt. 686, Public Law 773 [H.R. 8296]

"Alaska Mental Health Enabling Act", 70 Stat. at Large, Chapt. 772, Public Law 850 [H.R. 6370]

"Federal Executive Pay Act of 1956", 70 Stat. at Large, Chapt. 804, Public Law 854 [H.R. 7999]

"Department of Agriculture Organic Act of 1956", 70 Stat. at Large, Chapt. 950, Public Law 979 [H.R. 11682]

well as the Court of Appeals for the Seventh Circuit in *Nashville Milk Co. v. Carnation Co.* (R. 39-40) made extensive references to the legislative history of the Robinson-Patman Act.

The Patman bill (H.R. 8442) was introduced in the House by Representative Patman on June 11, 1935 (79 Cong. Rec. 9081). Joint hearings were held beginning July 10, 1935, and extending through the last session of the 74th Congress on the Patman bill and also on H.R. 4995 and H.R. 5062 introduced by Representative Mapes. Unable to reach a conclusion on the basis of its first hearings, further hearings were entrusted to a subcommittee headed by Representative Utterback. Prior to reconvening his subcommittee in February 1936, Mr. Utterback introduced his own bill (H.R. 10486), some features of which were ultimately incorporated into the Patman bill. On March 31, 1936, the House Committee favorably reported the Patman bill in modified form. It was passed by the House on May 28, 1936 (R. 23-4, 26).

On June 26, 1935, shortly after the introduction of the Patman bill in the House, Senator Robinson introduced an identical measure (S. 3154) in the Senate (79 Cong. Rec. 10329). No hearings were ever held on this measure. On February 3, 1936, the Senate Committee on the Judiciary favorably reported the Robinson bill with substantial amendments (R. 26).

On January 16, 1936, Senator Borah introduced a bill (S. 3670) dealing with price discrimination (80 Cong. Rec. 461) and on January 30, 1936, Senator Van Nuys introduced a similar measure (S. 3735) (80 Cong. Rec. 1194). On March 4 Senators Borah and Van Nuys consolidated their bills (S. 4171) (80 Cong. Rec. 3204) on which a subcommittee of

the Committee on Judiciary held hearings. No report was ever made on these measures (R. 26).

Section 3 of the Robinson-Patman Act as finally enacted originated as the Borah-Van Nuys bill (S. 4171). When the Robinson bill came to a vote in the Senate on April 23-24, 1936, the Borah-Van Nuys bill was attached to it as a floor amendment. As passed by the Senate it appeared as subsection (h) of the portion of the Robinson bill amending section 2 of the Clayton Act. The Borah-Van Nuys language was included in the quotation marks surrounding the entire amendment of section 2 of the Clayton Act appearing, as noted, as subsection (h) of said section (80 Cong. Rec. 814-19).

The Patman bill as passed by the House and the Robinson bill as passed by the Senate were referred to a Conference Committee. This Committee revised the bills and took the Borah-Van Nuys language out of the amendment of section 2 of the Clayton Act and out of quotation marks and carried it in the Committee bill as section 3 in which form it was finally passed (80 Cong. Rec. 9414). The action of the Conference Committee in removing the Borah-Van Nuys portion of the bill from the amendment of the Clayton Act affirmatively demonstrates that it was not intended as an amendment of such Act.

The language of the Borah-Van Nuys bill was unchanged from the time of its introduction until the time of its amendment. It is almost identical in wording to the Canadian Price Discrimination Act (see note), (p. 10, supra).

The report of the Conference Committee (80 Cong.

[illegible] Court has uniformly recognized committee reports, and statements of committee members as the most persuasive source of legislative history. [illegible] *Hearst v. Union Branch Bank*, 300 U. S. 440, 453-54 (1937); *United States v. United Mine Workers*, 330 U.S. 258, 278-80 (1947); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474-75 (1921); *Chicago, [illegible] Ry. Co. v. Minn. Rate Freight Co.*, 336 U. S. 465, 472-7 (1940).

Rec. 9414, 9902) with respect to both sections 2 and 3 of the Conference bill (subsequently enacted as the Robinson-Patman Act) expressly stated that only section 1 thereof was an amendment of the Clayton Act saying:

"Section 2.

"The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as section 2 of the bill itself, rather than as part of *the amendment to Section 2 of the Clayton Act, which is provided for in Section 1 of the present Bill.*

"Section 3.

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and, except for the paragraph dealing with cooperatives, separately treated in section 4 below, appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S. 4171). *While they overlap in some respects*, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in Section 1.*

"Section 3 authorizes nothing which *that amendment* prohibits and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of *the amendment provided in section 1*, section 3 sets up special prohibitions as to the particular offense therein described and attaches to them also the criminal penalties *therein* provided.

"Section 3 makes it possible for the person subjected to a discrimination prohibited *therein* to cause the offender to be prosecuted in the Federal Court of the district in which such violation is committed."

(House Report No. 2951, 74 Cong., June 8, 1936.) (Emphasis added.)

Representative Utterback, Chairman of the House Members of the Joint Conference Committee, in his report to the House with respect to section 3 (the Borah-Van Nuys bill) said (80 Cong. Rec. 9419):

> "Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in Section 2*. It authorizes nothing therein prohibited. It detracts nothing from them. Most of the acts which it does prohibit lie also within the prohibitions of that amendment. In that sphere this section merely attached to them its criminal penalties in addition to the civil liabilities and remedies already provided by the Clayton Act." (Emphasis added.)

Representative John E. Miller of Arkansas, now Federal District Judge for the Western District of Arkansas, one of the House Conferees of the Joint Conference Committee, stated (80 Cong. Rec. 9421):

> "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. *The first section of the bill as reported, has to do with only section 2 of the Clayton Act.*" (Emphasis added.)

Representative Miller, when asked whether section 3 was "a part of the same act," as that part of the bill amending the Clayton Act replied (80 Cong. Rec. 9421):

> "Of course it is, *but it is not a part of the Clayton*

Act as amended by section 2 [Section 1 of the Robinson-Patman Bill]." (Emphasis added.)

Representative Patman, co-author of the Robinson-Patman Act, in his testimony before a subcommittee of the House Judiciary Committee on May 19, 1959, stated that section 3 was definitely not a part of the Clayton Act or one of the antitrust laws. He said (Hearing on House H.R. 7905, Serial No. 14, Part 5, p. 48, 81st Cong. 2nd sess.):

> "* * * section 3 of the Robinson-Patman Act has never been added to the list of laws designated as 'antitrust laws' in section 1 of the Clayton Act.
>
> "* * * The House did not put section 3 in that act, it was put in in the Senate. Senator Borah and Senator Van Nuys were the authors, it was put in and in conferences, to get a bill, we agreed for it to stay in. Since that time section 3 has not been carried as part of the antitrust laws. It should be. I hope you will consider making it clear in this bill."

This legislative history clearly discloses that section 3 was introduced as a separate criminal provision, not a part of or an amendment to the Clayton Act.[1]

The question of treble damages was raised in both the House and the Senate during consideration of the Conference bill but only in the sense that if the same act violated both section 3 of the bill and section 1 of the bill (the latter of which amended Section 2 of the Clayton Act) the violator

[1] In Evans, "Anti-Price Discrimination Act of 1936", 23 Va. L. Rev. 140, after an exhaustive review of the legislative history of the Robinson-Patman Act, the author concluded (p. 150):

"The joining of the Borah-Van Nuys Bill, which in no way amends the Clayton Act, with the Patman Act leads to an extraordinary result. Section 1 of the Patman Act, becomes Section 2, et seq., of the Clayton Act, and must be read with other sections of that Act. Section 3, the Borah-Van Nuys Bill, remains a separate penal statute apart from all other anti-trust legislation, including Section 2 of the same Act."

would be subject to treble damages for the Clayton Act violation and also to criminal prosecution for the violation of section 3.

For example, the following colloquy took place between Representatives Hancock and Celler during consideration of the Conference bill on the floor of the House (80 Cong. Rec. 9420):

> "MR. HANCOCK *of New York:* If a vendor is found guilty of discrimination as provided in this bill, is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?
>
> MR. CELLER: If he violates the Borah-Van Nuys provision or the other provision of the bill, he is subject to penalties of a criminal nature and has committed an offense.
>
> MR. HANCOCK *of New York:* Would he also be liable for triple damages?
>
> MR. CELLER: And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue."

This change shows that in Mr. Celler's mind the treble damage remedy under the Clayton Act was separate and distinct from the criminal penalties of section 3 of the Robinson-Patman Act. The gentlemen were discussing discriminations in price which are unlawful under section 2 of the Clayton Act as well as under the first clause of section 3 of the Robinson-Patman Act. The same act of discrimination could be a violation of both sections subject to treble damages under the Clayton Act and also to criminal penalty under section 3.

Mr. Celler was a member of the House Conferees but in the debate from which the above excerpts were taken he was

arguing against approval of the report of the conferees on the ground that the inclusion of the Borah-Van Nuys provision created serious inconsistencies on the subject of discrimination and in fact he was objecting to the criminal penalties set up in the Borah-Van Nuys provision. That the same act of price discrimination would violate both section 2 of the Clayton Act as amended and the first clause of the Borah-Van Nuys provision as distinguished from the second and third clauses thereof was the basis of his opposition. The following exchange illustrates this (80 Cong. Rec. 9420):

> "MR. BOILEAU: I understand the Borah-Van Nuys is a separate and distinct section from the House provision, and some of the conferees on the part of the House have stated to me that there is no inconsistency and that the House provisions prevail, but that the Borah-Van Nuys amendment is an additional remedy.
>
> MR. CELLER: (After asking Mr. Boileau to read and compare Sections 1, 2, and 3 of the proposed bill) Also, let me point out, this bill is an amendment to the Clayton Act which provides that anyone aggrieved by any discrimination in price or discount or allowance can sue and recover treble damages from the person guilty of the discrimination. In addition, *for the single act of discrimination*, to the treble damages, the business man accused can by Section 3 of this bill, be hailed to Court and fined $5,000 or imprisoned for 1 year. I ask you to think carefully before you accept such a bill with such penalties. (Emphasis added.)

At another point Representative Miller exchanged views with Representatives Massingale and Hancock of New York as follows (80 Cong. Rec. 9421):

> "MR. HANCOCK *of New York*: Is it not perfectly clear that any vendor who discriminates in price between purchasers is guilty of a crime and is also subject

to triple damages to anyone who claims to be aggrieved?

MR. MILLER: That is true; but the criminal part is included in section 3 and section 3 only.

MR. HANCOCK of New York: But it is part of the same act?

MR. MILLER: Of course it is; *but it is not a part of the Clayton Act as amended by section 2.* It ought to be, as far as that is concerned, if a seller willfully discriminates." (Emphasis added.)

Again the gentlemen were discussing the fact that the same act of discrimination could violate both section 2 of the Clayton Act as amended and be subject to treble damage thereunder and the first clause of section 3 of the Robinson-Patman Act and be subject to its criminal penalties. Mr. Miller, who was a member of the House Conferees, was supporting the Conferee's report and urging its acceptance. That Mr. Miller understood it was not the purpose of Congress to create a treble damage remedy for violation of section 3 of the Robinson-Patman Act is clear from his remarks just prior to his exchange with Mr. Hancock quoted immediately above. The following colloquy occurred between Mr. Massingale and Mr. Miller (80 Cong. Rec. 9430):

"MR. MASSINGALE: Does the bill as agreed to by the conferees carry the penalty of treble damages and also a penalty under the criminal law?

MR. MILLER: The penalty of treble damages is the old law. In other words, we made no change in that particular provision of the Clayton Act. Section 3, which the gentleman from New York talks about, is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of the bill has nothing to do with criminal offenses. It deals primarily, in my opinion, with the authority of the Federal Trade Commission to regulate and enforce the provisions of Sec-

tion 2 of the Clayton Act as amended. The section 3 in the bill is placed in an effort to make the criminal offense apply only to that particular section, and I believe that is a reasonable construction, if you will look at the bill."

The Conferees as well as Congress deliberately and intentionally refrained from making any change in the treble damage provisions of the Clayton Act. It would have been a simple matter to have amended section 4 of the Clayton Act so as to include the Borah-Van Nuys provision. But Congress having failed to do so, it is respectfully submitted that the courts are not at liberty to supply a remedy which Congress expressly refrained from providing.

In the Senate in the debate on the Conference report, Senator Vandenburg asked the following question of Senator Van Nuys, one of the authors of the provision involved herein (80 Cong. Rec. 9903):

> MR. VANDENBURG: Mr. President, I should like to ask the Senator from Indiana one or two questions about the conference report.
>
> The fact has been called to my attention that section 3 of the bill, as agreed upon in conference, makes certain discriminations punishable by fine and also subject to treble damages, while similar discriminations under section 2 (b) would be subject to rebuttal by showing, for instance, that a reduced price was made in good faith to meet an equally low price of a competitor. In other words, it is asserted to me that the defense allowed under section 2 (b) is not permitted under section 3, although the act or the offense would be the same.
>
> MR. VAN NUYS: I think the Senator is mistaken there. The proviso to which he refers is simply a rule of evidence rather than a part of the substantive law.

> If a prima-facie case is made against an alleged unfair practice, the respondent may rebut the prima-facie case by showing that his lower prices were made in good faith to meet the prices of a competitor. That is a rule of evidence rather than substantive law."

Again this language does not support the contention that section 3 permits private treble damage actions. It was recognized throughout the debates that the same act of price discrimination could be subject to treble damages under section 2 of the Clayton Act as amended and also to criminal penalty under section 3 of the Robinson-Patman Act. Mr. Vandenburg's question was concerned with whether the good faith defenses provided for in section 2 of the Clayton Act as amended would be available under section 3. In his answer Mr. Van Nuys addressed himself to that question alone.

The legislative history of the Robinson-Patman Act clearly establishes that no private action for treble damages may be maintained for injuries caused by violation of section 3 of that Act. As noted by the Court of Appeals for the Seventh Circuit in *Nashville Milk Co.* v. *Carnation Co.*, 238 F.2d 86, 89 (R. 39):

> "The legislative history is convincing that there was no intention by Congress for Section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act. * * *"

The 1950 statement of Mr. Patman and the 1936 statements of Messrs. Miller, Utterback and other Congressmen remove all possible doubt as to what was Congress' purpose and what it did.

D. The District Court Correctly Followed the Sounder View in Denying a Private Cause of Action Under Section 3.

The sounder reasoning as well as the more persuasive authorities support the decision of the district court herein (R. 8-27) and the decision of the Court of Appeals for the Seventh Circuit in *Nashville Milk Co. v. Carnation Co.*, 238 F.2d 86 (R. 35-41).

In addition to the opinions of the Court of Appeals for the Seventh and Tenth Circuits, the issue has also received the attention of the Court of Appeals for the District of Columbia in *National Used Car Market Report Inc. v. National Auto. Dealers Assn.*, 108 F.Supp. 692 (D. D.C. 1951), aff'd, 209 F.2d 359 (1952). The district court in dismissing a complaint under section 3 of the Robinson-Patman Act said (p. 694):

> "The Court is inclined to the view that no action for damages or injunction is maintainable under the section in question."

The Court of Appeals in affirming said (p. 359):

> "We think the District Court was right, for reasons it gave, in dismissing" the section 3 count.

Other courts have expressed the belief that no private right of action exists for violation of section 3 of the Robinson-Patman Act. In *Hershel California Fruit Products Co. v. Hunt Foods*, 119 F.Supp. 603 (N.D. Cal. 1954), the court expressed "grave doubts" as to whether section 3 is one of the "antitrust laws" so as to provide a private action for its violation.

The court below relied heavily upon the opinion in

Balian Ice Cream Co. v. Arden Farms, 94 F.Supp. 796 (S.D. Cal. 1950), and the authorities cited therein. However, upon analysis none of the authorities relied upon involved the specific issue presented here.

In the *Balian* case Judge Yankwich relies upon and discusses eight cases, five of which are decisions by courts of appeals (94 F.Supp., 802).

Biddle Purchasing Co. v. Federal Trade Commission, 96 F.2d 687 (2nd Cir. 1938), did not involve section 3 of the Robinson-Patman Act but was limited to illegal brokerage fees under section 2(c) of the Clayton Act as amended (15 U.S.C. Sec. 13(c)), which section was clearly amended by the Robinson-Patman Act.

Oliver Bros., Inc. v. Federal Trade Commission, 102 F.2d 763 (4th Cir. 1939), also only involved section 2 of the Clayton Act as amended, specifically sections 2(a), (b), (c), (d) and (f) thereof (15 U.S.C. Secs. 13(a), (b), (c), (d), and (f)), all of which were expressly amended by section 1 of the Robinson-Patman Act. Again section 3 of that Act was not involved.

Southgate Brokerage Co. v. Federal Trade Commission, 150 F.2d 607 (4th Cir. 1945), was concerned only with illegal brokerage fees under section 2(c) of the Clayton Act as amended (15 U.S.C. Sec. 13(c)) and section 3 was not involved. This is equally true of *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667 (3rd Cir. 1939), and *Webb-Crawford Co. v. Federal Trade Commission*, 109 F.2d 268 (5th Cir. 1940). No question of any private right of action under section 3 of the Robinson-Patman Act was involved in any of these cases. General statements made in these cases that the Robinson-Patman Act amended the Clayton Act refer only to section 1 of the

Robinson-Patman Act which admittedly did amend the Clayton Act.

Judge Yankwich in the *Balian* case also referred to several district court cases which are equally unpersuasive. *Atlanta Brick Co. v. O'Neal*, 44 F.Supp. 39 (E.D. Tex. 1942) did involve section 3 of the Robinson-Patman Act and the court took the position without the citation of any authority or discussion of the legislative history of the Act that since the section made certain acts unlawful a person injured could invoke its provisions. This is contrary to the great weight of authority and the principle that when Congress creates a new offense and provides a penalty that penalty is exclusive. The court admitted, however, that the section does not by its terms grant a private right of action for treble damages and in fact it denied an action for treble damages, holding only that an action for compensatory damages could be maintained under section 3. The court did not hold that section 3 was within the provisions of section 4 of the Clayton Act (15 U.S.C. Sec. 15) creating a treble damage remedy for violation of the "antitrust laws".

A. J. Goodman v. *United Lacquer Mfg. Co.*, 81 F.Supp. 896 (D.C. Mass. 1949), did not hold that a private right of action exists for a violation of section 3, for the complaint in that action was dismissed on another ground. The most that can be said for the language used in this case is that the court believed that the complaint set forth sufficient facts to show a violation of section 3. The existence of a private right to sue for treble damages under section 3 was not at issue.

Judge Yankwich in the *Balian* case overlooked the plain language, text and punctuation of the Robinson-Patman Act and its legislative history. The decision is in error and will not withstand close analysis.

The case of *Spencer* v. *Sun Oil Co.*, 94 F.Supp. 408 (D.C. Conn. 1950), is equally unpersuasive. The issue of whether section 3 of the Robinson-Patman Act affords private relief was raised but the court resolved it in one sentence without the citation of any authority. The court completely ignored the legislative history of the Act as well as its form, punctuation and wording. The decision of this issue was not necessary to the case because the court dismissed the complaint on its merits for the reason that the facts alleged did not come within the purview of section 3.

Myers v. *Shell Oil Co.*, 96 F.Supp. 670 (S.D. Cal. 1951), relies upon the *Balian* case and was decided by a different judge in the same district in which the *Balian* case arose. It merely follows *Balian* opinion and has no more validity than that case.

The question at issue herein was not raised in *Moore* v. *Mead's Fine Bread Company*, 348 U.S. 115 (1954), and the dicta in the case of *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1946) is, of course, not dispositive.

As shown by the able opinion of the district court herein (R. 8) and of the Court of Appeals of the Seventh Circuit in *Nashville Milk Co.* v. *Carnation Co.* (R. 37n), the question of whether section 3 permits a civil action for treble damages was not raised in the *Mead* case in any court. It was neither briefed nor argued in that case. The Attorney General's National Committee to Study the Antitrust Laws in its report dated March 31, 1955, properly evaluated the effect of the *Mead* case on this question, stating (p. 200):

> "There are persisting basic questions as to whether the prohibitions of Section 3 convey a sufficiently clear warning or proscribed criminal conduct to meet the Constitution's safeguards of fair and adequate notice to prospective defendants. While some courts have

confessed serious doubt of Section 3's constitutionality; others have sustained the Act. But no appellate court to date has rendered an authoritative statutory interpretation, either defining the section's status as a privately enforceable antitrust law or settling its constitutional validity.'"

"'In a recent decision, the Supreme Court's reversal of a Court of Appeals' adverse ruling on a private plaintiff's cause of action evidently assumed but did not expressly decide both points. *Moore* v. *Mead*, 348 U.S. 115 (1954). Since neither litigant raised the issues, we do not construe the Court's decision as controlling legal authority on questions not at bar or adjudicated.'"

The decision in the *Mead* case therefore lends no support to respondent's contention.

The quotation from the opinion in *Bruce's Juices* case, *supra*, relied on by the court below (R. 33) does not constitute pursuasive authority. It is dictum not necessary for a decision and not, therefore, the result of careful analysis and research requisite for a decision. It also does not mean that a violation of section 3 as such would give rise to an action for treble damages. The alleged violations in *Bruce's Juices* were limited to discriminatory discounts which would sustain a treble damage action under section 2 of the Clayton Act as amended (15 U.S.C. Sec. 13) as well as violate the first clause of section 3 of the Robinson-Patman Act. This statement means no more than that the same act of discrimination may violate both sections and be subject to the penalties as provided in those sections.

Legal scholars and commentators have likewise concluded that Section 3 is not within the provision of section

4 of the Clayton Act for treble damages.' Thus Vol. 50 Harvard Law Review 106, 121-122 (1936) states:

> "Since Section 3 is a criminal statute, it will be enforced by the Department of Justice. While ordinarily a violation of Section 3 is also a violation of Section 1, the offender under Section 3 is not subject to triple damage litigation, for that section is not part of the Clayton Act."

Werne, *Business and the Robinson-Patman Law* (1938) states (p. 63):

> "The department of Justice has jurisdiction to enforce the Act by Civil proceedings for injunctions under Section 1, and by criminal proceedings under Section 3. Private parties may also bring suits under Section 1 (but not Section 3) for injunctions or for treble damages."

In 85 University of Pennsylvania Law Review, 306, 312 (1936) it is said:

> "Section 3 of the Act makes certain practices punishable by fine, imprisonment, or both. Although introduced as an amendment to Section 2 of the Clayton Act, as finally enacted it is independent thereof, so that for violations of its provisions the offender is subject only to the penalties just mentioned."

22 Washington University Law Quarterly, p. 153 at 182 (1937) observes:

> "Since this provision (section three) is not technically a part of the Clayton Act, there can be no civil liability for its violation, in any event; and the only

[1] Cf. "Regulation of Business—Civil Action Under Section 3 of the Robinson-Patman Act"; 55 Mich. L. Rev. 845 (1947), suggesting that whether or not a private action is available under Section 3, the statute contains infirmities which might lead to its unconstitutionality. Petitioner raised the question of constitutionality of Section 3 in the district court, which declined to decide it in light of its disposition of the case although it did indicate "grave doubts" with respect to the constitutionality of Section 3 (R. 13).

method by which it may be enforced is by a criminal action for the imposition of the penalties therein provided."

22 American Bar Association Journal 593 (1936) at page 649, n. 14 further states:

"No means of enforcing Section 3 is expressly provided in the Robinson-Patman Act except criminal actions by the Attorney General. Except where such right are expressly given no private litigant can enforce laws of this character. See *Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165. The provisions of the Clayton Act giving such a remedy for violations of the anti-trust laws do not apply to Section 3 because Section 3 is not made part of Section 2 of the Clayton Act as amended, and so is not technically part of the 'anti trust laws' as defined in the Clayton Act."

In 41 Minn. L. Rev. 359 (1957) the author states (pp. 363-4):

"* * * Undoubtedly the private treble damage action, in supplementing government enforcement, is an integral part of the antitrust procedure. But the gravity of the treble damage judgment and the possibility of harassing and non-meritorious litigation based upon the uncertain prohibitions of section three suggest that in lieu of congressional authorization of civil action in specific words, the objectives of competition might be best served by placing the power of suit under section three only in the hands of government enforcement agencies."

In 26 Fordham L. Rev. 126 (1957) it is stated (p. 130):

"To allow a suit for treble damages and injunctive relief for a breach of section 3 of the Robinson Patman Act would lead to an incongruous result. Section 3 is broader in its application to business transactions than is section 2. If section 3 supports private action under

sections 4 and 16 of the Clayton Act along with its own criminal sanction, section 2 is rendered superfluous. Such a result could hardly have been intended.".

In "Criminal Penalties, Section 3 of the Robinson-Patman Act—'Dead Horse' or 'Sleeper'?", by C. Brien Dillon, ABA Section of Antitrust Law, April 5-6, 1956, p. 112, after reviewing the text, punctuation and form of Section 3 and its legislative history the author concludes (p. 117):

> "It seems fair to conclude, then, that Section 3 is a separate criminal statute which deals with many of the same items dealt with by Section 2 of the Clayton Act, but that it is not privately enforceable by a treble damage action.".

The Attorney General's National Committee to Study the Antitrust laws is also in wholehearted agreement with the proposition that section 3 does not and should not afford a private right of action for treble damages, stating in its Report of March 31, 1955, p. 200:

> "We believe that acceptance of Section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all, should be accessible only to the Government which has already sought to limit its application."

On principle the district court herein and the Court of Appeals for the Seventh Circuit reached the sound conclusion. If section 3 of the Robinson-Patman Act affords private relief merely because it deals generally with anti-

trust matters as the court below held (R. 31), this argument would be equally applicable to the Federal Trade Commission Act (15 U.S.C. Sec. 45, et seq.) as well as to any other act dealing generally with the regulation of business heretofore or hereafter enacted by Congress even though Congress does not provide a private remedy under such laws.

It has been expressly held that no private action for a violation of the Federal Trade Commission Act may be maintained even though that Act prohibits "unfair methods of competition" in interstate commerce. *Atlanta Brick Co. v. O'Neal*, 44 F.Supp. 39, 42 (E.D. Tex. 1942); *Samson Crane Co. v. Union National Sales*, 87 F.Supp. 218, 221 (D.C. Mass. 1949), aff'd 180 F.2d 896 (1st Cir. 1950); *National Fruit Products Co. v. Dwinell-Wright Co.*, 47 F.Supp. 499, 504 (D.C. Mass. 1942).

Certainly the policy behind the desire for private enforcement of the antitrust laws[1] is no stronger with respect to section 3 of the Robinson-Patman Act than as to section 5 of the Federal Trade Commission Act. The Congressional intent or "proliferation of purpose"[2] as clearly expressed in sections 1 and 4 of the Clayton Act and section 3 of the Robinson-Patman Act is that no private cause of action is created by the latter statute. Congress apparently believed that section 3's vague proscriptions would be better enforced by the Department of Justice than by private individuals since other statutes also condemn price discrimina-

[1] See 70 Harv. L. Rev. 1390, 1393 (1957), where the author advances the argument that private litigants should be enabled to enforce section 3 because the Justice Department has not been prosecuting violations of this statute. The reasons for that department's forsaking of this law may be many, including the law's vagueness, a possible recognition that it does not further the public interest, etc. But whatever the reasons, this scarcely warrants the establishment of private enforcement procedures by court order.

[2] This apt phrase is used by Mr. Justice Frankfurter in "Some Reflections on the Reading of Statutes", 47 Col. L. Rev. 527, 538 (1947) to describe the legislative aim, policy and purpose in drafting the statute.

tion and predatory pricing activities.[*] Private individuals accordingly are not without remedy for damage to their business or property occasioned by these practices. Authorizing private suits under section 3 might only encourage harassing and non-meritorious litigation based upon its uncertain proscriptions.

We respectfully submit that a court is not at liberty to do what Congress did not do. The question presented is what Congress did, not what it could have done or should have done. Courts are not at liberty to enlarge a statute or change its meaning. As Mr. Justice Cordoza said in *Anderson v. Wilson*, 289 U.S. 20 (1933) at page 27:

> "We do not pause to consider whether a statute differently drawn would yield results more consonant with fairness and reason. We take this statute as we find it."

CONCLUSION

For the reasons state, petitioner respectfully submits that the decision of the court below should be reversed.

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[*] Section 2 of the Clayton as amended (15 U.S.C. Sec. 13) also prohibits price discriminations. The Government has given the first clause of section 3 a very restrictive meaning. See Report of the Attorney General's National Committee to study the Antitrust Laws, March 31, 1955, pp. 199-201.

Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555 (1931); *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2nd Cir. 1929), cert. den. 279 U.S. 858 (1929); *National Nut Co. v. Kelling Nut Co.*, 61 F. Supp. 76 (N.D. Ill. 1945).